

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

(petitioner)

DECISION

MRA-40/50585

PRELIMINARY RECITALS

Pursuant to a petition filed September 19, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Milwaukee County Dept. of Human Services in regard to Medical Assistance (MA), a hearing was held on October 23, 2001, at Milwaukee, Wisconsin.

The issue for determination is whether assets and income may be allocated to the community spouse to increase her income allocation closer to the minimum monthly needs allowance.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

(petitioner's rep)

State Agency:

Wisconsin Department of Health and Family Services

Division of Health Care Financing

1 West Wilson Street, Room 250

P.O. Box 309

Madison, WI 53707-0309

By: Elizabeth Boyd, ESS

Milwaukee County Dept Of Human Services

1220 W. Vliet St, 3rd Floor

Milwaukee, WI 53205

Administrative Law Judge:

David D. Fleming

Division of Hearings and Appeals

FINDINGS OF FACT

1. The Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Milwaukee County.
2. An application for institutional Medical Assistance was filed with the county agency on behalf of the Petitioner on August 14, 2001. The application sought backdating of benefits to May 1, 2001. That application was denied due to excess assets. The asset limit was determined by the county agency to be \$ 89, 000.00.
3. The Petitioner and his community spouse have assets of approximately \$ 238,700.00. The assets involved here are owned primarily by the Petitioner's community spouse and all are interest producing.
4. The Petitioner's monthly income is \$ 1452.83 consisting of Social Security Administration (SSA) benefits (\$1334.00) and payments from an annuity (\$118.83). His community spouse has income in

the amount of \$ 1008.97 consisting of SSA benefits (\$454.00) and interest from the assets noted at Finding # 3 (\$554.97).

5. The Petitioner's community spouse has an excess shelter expense of \$ 89.32.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stats. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Wis. Stats. §49.455(4)(a). The minimum monthly maintenance needs allowance is the lesser of \$ 2175.00 or \$ 1935.00 plus shelter costs in excess of \$ 580.50. MA Handbook, Appendix 23.6.0. In this case the minimum monthly needs allowance is \$ 1935.00 plus the excess costs of \$ 89.32 for a total of \$ 2024.32.

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county determined that the current asset allowance for this couple is \$89,000.00. See the MA Handbook, App. 23.4.2, which is based upon Wis. Stats. §49.455(6)(b). If the couple's assets are at or below the determined asset limit, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

The issue in this case is the county agency's denial of the Petitioner's MA application based on excess assets. § 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s. 1396r-5, known as MCCA. The Petitioner seeks to have the Division of Hearings and Appeals reallocate resources under § 49.455(8)(d), Stats., to provide his community spouse the maximum monthly income allowed by § 49.455(4)(a)2. In addition, the maximum income amount calculated under § 49.455(4)(b) in this case is currently \$1875.00. See MA Handbook, App. 23.4.1 and 23.6.0.

However, under § 49.455(6)(b)3, resources can be reallocated to the community spouse at a fair hearing. Sub. (8)(d) provides as follows:

If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department **shall** establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates

enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c). (Emphasis added).

Based upon the above, the Division of Hearings and Appeals can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant the Division of Hearings and Appeals the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the Division of Hearings and Appeals must first allocate resources to maximize the community spouse's income and only if the resources' income does not bring the community spouse's income up to the monthly minimum can the institutionalized spouse's income be allocated. The Blumer decision is on appeal to the United States Supreme Court, but currently it is the law that must be followed.

In this case the Petitioner's community spouse has income of \$ 1008.97 including all income from assets. Thus all of the couple's countable assets are to be transferred to the to the community spouse. This means, however, that the community spouse is entitled to \$ 1015.35 of the Petitioner's income in order to bring her income to the \$ 2024.32 minimum monthly needs allowance.

CONCLUSIONS OF LAW

1. That all of the non-exempt assets of the Petitioner and his wife must be allocated to the community spouse to maximize her monthly income.
2. The Petitioner's wife is entitled to that portion of the Petitioner's income necessary to increase her income to the minimum monthly needs allowance of \$ 2024.32.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to the county agency with instructions to take the administrative steps necessary to allocate all of the couple's non-exempt assets to the community spouse, to allocate income from the Petitioner to his wife to raise the community spouse's income to the monthly minimum needs allowance and to certify the Petitioner for MA. These steps must be taken within 10 days of the date of this Order but in no event later than December 18, 2001.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in § 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in § 227.53 of the statutes.

Given under my hand at the City of
Milwaukee, Wisconsin, this 7th day of
December, 2001.

/sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals
12-4/DDF